I was not impressed by the argument. This deed came into existence at the very last moment long after these proceedings were instituted and in actual fact some eight months after this action was fixed for trial on the 1st, 2nd and 3rd April 1959 when it was adjourned to meet the convenience of counsel. There is nothing to indicate the value of the property set aside or its precise nature and it represents, in my view, nothing more nor less than a belated and utterly inadequate attempt to do what the trustees should have done years ago.

There was the plaintiff's solicitors' letter of the 20th September 1957 to which I have referred which was met by a refusal by the trustees to supply any information at all. On proceedings being instituted we find the trustees challenging the validity of the trusts which they were appointed under the will to discharge on the ground that they were void and of no effect and this stand they maintained, as I have said, up to and until the first day of the hearing.

Finally, it was submitted by counsel for the 2nd and 3rd defendants at the very close of his address that justice would be done if I adjourned the action at that stage for three months to enable the trustees to satisfy the plaintiff that the Valibhoy Charitable Trust has been duly constituted. Counsel intimated that whatever may have been the position previously, the trustees were now *ad idem* and prepared and willing to implement the Valibhoy Charitable Trust as quickly as possible.

I refused to grant any such adjournment to enable the trustees to do now, because of the salutary effect these proceedings have had on them what they should have done years ago.

The defendants have not in the view I take properly carried out or appreciated their responsibilities as trustees. For the reasons I have stated, I am satisfied that the relief sought by the plaintiff in this action must be granted.

I think perhaps I should add that, in my opinion these proceedings were properly instituted by the Attorney-General on the relation of Kassam Mohamed Moonshi.

In the result therefore there must be judgment for the plaintiff as follows :—

1. Order that the trusts of the will of the testator be carried out.

2. For accounts and enquiries as to what the testator died possessed of in Singapore, the Federation of Malaya and India.

3. Necessary accounts and enquiries to ascertain the value of the one-third share of the nett estate of the testator.

4. Appropriation for the purposes of the Valibhoy Charitable Trust of such part of the movable and immovable property of the Estate as shall be equivalent to one-third share of the value of the nett estate (less a sum of Rs. 50,000) and one-third share of the Income of the nett estate from the date of the testator's death.

I direct that British & Malayan Trustees Ltd. be appointed an additional trustee to act jointly with the abovenamed first, second and third defendants of that part of the estate of abovenamed testator which shall be so appropriated as aforesaid for purposes of the said Valibhoy Charitable Trust.

Plaintiff's costs to be taxed as between solicitor and client and paid out of the estate.

Defendants to be entitled to one set of costs only to be taxed as between solicitor and client and paid out of the estate.

Order accordingly.

Solicitors: *Mallal & Namazie; Sisson & Delay; Donaldson & Burkinshaw.*

THE COMPTROLLER OF INCOME TAX v. X. RUBBER CO. LTD.

[A.C.J. (Rigby J.) March 28, 1961]

[Penang — Civil Appeal No. 8 of 1960]

Income Tax — Cost of installing one watergate to replace damaged one of several — Whether deductible as "income expenditure" — "Replacement" and "repair of premises" — Income Tax Ordinance, 1947, ss.14(1)(c), 16, 18A and 77.

The respondents were the owners of a rubber estate in a low lying area in Perak. The drainage system was controlled by ten watergates. As a result of a leakage in one of these a new gate was installed costing $15,300. The question for the consideration of the Court was whether the Board of Review was right in holding that the work carried out by the respondents on their land could properly be regarded as income expenditure as distinct from capital expenditure and as such deductible under section 14(1)(c) of the Income Tax Ordinance.

Held: (1) there was evidence before the Board upon which it could properly come to the conclusion to which it did, and this Court ought not to interfere with its findings and decision;

(2) a vital consideration in deciding whether the work done constitutes a "replacement" or "repair of premises" is the size, the extent and importance of the work done in relation to the tax payers whole income producing undertaking and whether or not it can be said that such work has resulted in the creation of a new asset;

(3) the construction of the new watergate was a repair of premises, such premises being the whole drainage system of the ten watergates, and the construction of the single watergate, taken by itself, was not an independent entity which could be said to create any new asset and as a consequence the cost of the construction of such watergate ought to be regarded as income expenditure.

Obiter: "The simple process of building a new gate every year or alternate year . . . . if embarked upon would clearly not be a repair of existing premises but a replacement of those premises by a new drainage system. That would be a capital and not an income expenditure."

Observations on the construction of proviso to section 14(1)(c) of the Income Tax Ordinance.

Cases referred to:—

(1) *Samuel Jones & Co. (Devonvale) Ltd.* v. *Commissioners of Inland Revenue* (1950-52) 32 T.C. 513.

(2) *Rhodesia Railways* v. *Income Tax Collector, Bechuanaland* [1933] A.C. 368 at p. 374.

(3) *Lurcott* v. *Wakely & Wheeler* [1911] 1 K.B. 905, 923-24,

(4) *Margrett (H.M. Inspector of Taxes)* v. *The Lowestoft Water & Gas Co.* (1933-35) 19 T.C. 481.

(5) *Bullcroft Main Collieries Ltd.* v. *O'Grady (H.M. Inspector of Taxes)* (1928-33) 17 T.C. 93.

(6) *Phillips (H.M. Inspector of Taxes)* v. *Whieldon Sanitary Potteries Ltd.* (1950-52) 33 T.C. 213.

INCOME TAX APPEAL.

G. S. Hill for the appellant.

Eusoffe Abdoolcader for the respondent.

Cur. Adv. Vult.

Rigby J.: This is an appeal at the instance of the Comptroller of Income Tax, under section 77 of the Income Tax Ordinance, 1947, from a decision of the Board of Review. The short but important point for consideration is as to whether or not the Board was right in holding that certain work carried out by the respondents on their land could properly be regarded as income expenditure, as distinct from capital expenditure, and therefore wholly deductible under section 14(1)(c) of the Ordinance. Section 14(1)(c) enacts :—

"14. (1) For the purpose of ascertaining the income of any person for any period from any source chargeable with tax under this Ordinance, in this Part referred to as 'the income', there shall be deducted all outgoings and expenses wholly and exclusively incurred during that period by such person in the production of the income, including:

(c) any expenses incurred for repair of premises, plant, machinery or fixtures employed in acquiring the income, or for the renewal, repair or alteration of any implement, utensil or article so employed:

Provided that no deduction shall be made.....for the cost of reconstruction or rebuilding of any premises, buildings, structures or works of a permanent nature."

The relevant facts for consideration may be taken from the statement of agreed facts put by both parties before the Board of Review. The respondent company are the owners of a rubber estate which has been in existence for nearly 50 years. The estate fronts the Perak River and is low lying, which necessitates drainage. The drainage is into the Perak River. The river is, however, tidal at this point and it is necessary to provide against possible feed back from the river, especially at high tides.

The present drainage system is controlled by ten watergates each of which closes automatically when the level of the water in the river exceeds that on the estate and opens automatically when the level of the water on the estate exceeds that in the river. The ten gates are connected by means of unlined channels. The waters on the estate are channelled to the gates and the water from any part of the estate could find its way out through any gate. The system would work to some extent if one or more gates were blocked. In the course of the hearing evidence was also adduced, and uncontradicted, that if one gate was out of action it would delay the clearage of the water inside the estate from the immediate area of that gate, although the water would eventually manage to drain out through the other gates. If there was a high tide there would be an ingress of water during that high tide which would lead to flooding of the estate. It was further stated that the old gate was leaking from below and was not possible to repair.

The matter for consideration before the Board of Review concerned a new gate installed in 1956. The old gate leaked and it was decided to install a new gate. The new gate is approximately 30 feet away and is of a similar construction to the one replaced, viz. it is automatic and is made of concrete. The new gate fulfils the same function as the one replaced and is linked in the same way with the other gates.

The cost of construction of the new watergate was $15,300. The respondent company maintained that the replacement, without material improvement, of the one watergate was necessary to ensure the proper functioning of the drainage system as a whole and as such it was a "repair of premises" employed in the production of income. As such they claimed that the whole cost of such repair was a properly deductible item under section 14(1)(c) to be set off against their gross taxable income for the relevant period of assessment.

On the other hand the Comptroller contended that the construction of the new gate was, in fact, a replacement and not a repair and, as such, it was capital and not income expenditure and therefore the cost of such replacement was not wholly deductible as of right under section 14 but an allowance towards the cost of such work could be claimed (and was in fact granted) under section 16 of the Ordinance.

The Board of Review, relying upon the anthority of *Samuel Jones & Co. (Devonvale)* v. *Commissioners of Inland Revenue*[1], held that the watergate which was built was not a replacement but a repair to an existing system of water drainage. The Comptroller now appeals to this Court against that decision.

I am clearly of the opinion that there was evidence before the Board upon which it could properly come to the conclusion to which it did, and that this Court ought not to interfere with its findings and decision. It seems to me that what one has to consider is not the construction of the simple watergate as an independent entity but the relation it bears to the whole drainage system. The drainage system depended for its effectiveness on the satisfactory working of all the gates, and I think Mr. Eusoffe Abdoolcader, who appeared as counsel for the respondent company, was right in describing it as "one continuous unit of defence against flooding". Of what value was this single watergate standing on its own? Looking at the plan produced in evidence and bearing the evidence in mind together with the statement of agreed facts, the answer to the above question appears to me clearly and incontrovertibly to be that it was of no single value as an independent entity. Standing by itself it did not result in the creation of

any new asset; it was an expenditure incurred to maintain the respondent company's existing drainage system in an effective working condition. The fact that it was an entirely new watergate did not, in itself, constitute it a "replacement" as distinct from "repair of premises" within the meaning of the sub-section. The "premises" here, in my view, were the whole system of watergates constituting the drainage system as an entirety. This single watergate was merely a cog in that system. The replacement of the existing watergate by the building of a new one was simply a repair of the drainage system as an entirety. One may "repair" a damaged motor-car engine by "replacing" some of the worn or defective parts. As their Lordships of the Privy Council pointed out in the case of *Rhodesia Railways* v. *Income Tax Collector, Bechuanaland*[2], adopting and approving the words of Buckley L.J. (as he then was) in *Lurcott* v. *Wakely & Wheeler*, [3] "'repair' and 'renew' are not words expressive of a clear contrast" and "repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion".

Reliance was placed by Mr. Hill, who presented the case with great clarity and cogency as counsel on behalf of the Comptroller, on the cases of *Margrett (H.M. Inspector of Taxes)* v. *The Lowestoft Water & Gas Co.*[4] and *Bullcroft Main Collieries Ltd.* v. *O'Grady (H.M. Inspector of Taxes*[5]). In the former case the company replaced an existing reservoir with a new and considerably improved one built some distance away. The company then sought to claim part of the cost of construction as being moneys expended for repair of premises under Rule 3(d), Cases I and II, Schedule D, Income Tax Act, 1918 and, therefore, an income expenditure wholly deductible from their gross taxable income for the relevant period of assessment. The High Court (Finley J.), following the decision of Rowlatt J. in the *Bullcroft Main Collieries Ltd. case,* to which I will in a moment refer, held that although it was true that the reservoir was part only of the respondents' physical undertaking, it was a part perfectly clearly divisible from the rest and it was the part then under consideration. He held that the reservoir was a replacement and clearly payable out of capital and not income expenditure.

In the *Bullcroft Main Collieries Ltd. case* the company replaced a chimney which had become unsafe by a new chimney, erected on an adjacent site, which was admitted to be an improvement on the old one. The company claimed as a deduction in computing its profits for income tax purposes that part of the cost of the new chimney which was charged in its accounts for the year forming the basic period for the relevant period of assessment. The Special Tax Commissioners held that the new chimney was, in fact, a replacement of the old chimney by a better one; that the replacement was of a capital nature and that no part of the expenditure upon it could be allowed. That decision was upheld by the High Court. Rowlatt J. there said that if you replace in entirety, it is not repairing an old one. The question is, of course, what constitutes the entirety: the answer to which, as Rowlatt J. pointed out, is very largely a question of degree depending upon the facts in each particular case. In that case the Court held that the new chimney, which was an improvement upon the old one and which was, in fact, built and brought into use before the old one was pulled down, constituted an entirety in itself and it could not be regarded as a repair of a subsidiary part of the factory.

However, in the later Scottish case of *Samuel Jones & Co. (Devonvale) Ltd.* v. *Commissioners of Inland Revenue*[1], the Court of Sessions sitting as the Court of Exchequer in Scotland, sought to distinguish the *Bullcroft Main Collieries Ltd. case.* Samuel Jones & Company carried on a trade of processing paper. A chimney of the factory was replaced because of its dangerous condition, but the replacement did not constitute an appreciable improvement. The company claimed a deduction in computing its profits for income tax purposes of the cost of removing the old chimney and building the new one. The Commissioners of Inland Revenue, considering themselves bound by the decision in the *Bullcroft Main Collieries Ltd. case,* held that the cost of replacement of the chimney was capital expenditure, but allowed the cost of removing the old chimney. The Court of Session reversed the decision of the Special Commissioners and held that the whole cost of replacing the chimney (including the cost of removing the old chimney) was an admissible deduction. In arriving at that conclusion they distinguished the *Bullcroft Main Collieries Ltd. case* — and, indeed, the *Lowestoft Water & Gas Co. case* — by pointing out that in both those cases the new structures were an admitted improvement upon the earlier existing structures. The Lord President (Cooper) in the course of his judgment said at page 518 :—

> "It is no part of our duty to review the decision of Rowlatt J., as applied to the facts in the *O'Grady case,* but so far as this case is concerned the facts seem to me to demonstrate beyond a doubt that the chimney with which we are concerned is physically, commercially and functionally an inseparable part of an 'entirety', which is the factory. It is quite impossible to describe this chimney as being in the words of Rowlatt J., the 'entirety' with which we are concerned. It is doubtless an indispensable part of the factory, doubtless an integral part; but none the less a subsidiary part, and one of many subsidiary parts, of a single industrial profit-earning undertaking."

Lord Carment said :—

> "In the present case I am clearly of opinion that the unit to be considered is the factory and the chimney cannot be taken in isolation. There was no improvement in the factory, on the findings of the case, by the erection of the new chimney in place of the old."

I find myself in complete agreement with the Board of Review in this case that if one takes the above passage which I have quoted from the judgment of Lord Carment and substitutes the words "water system" for the word "factory" and "watergate" for the word "chimney", the words used by him apply with equal force with the case now under consideration.

Finally, Mr. Hill referred to the case of *Phillips (H.M. Inspector of Taxes)* v. *Whieldon Sanitary Potteries Ltd.*[6]. There the company erected an embankment to take the place of an old embankment which had subsided as a result of which water was seeping from the adjacent canal into the company's business premises. The Court (Donovan J., as he then was) held that the act of constructing the new barrier constituted a new asset and was therefore capital expenditure. Donovan J. there (at page 220) appears to have taken the view that the question whether or not the work carried out constitutes an improvement is irrelevant for the purpose of deciding whether it is capital or income expenditure: the true test is the size and importance of the work itself in relation to the "premises" of the taxpayer used or occupied by him in the production of his income.

On a careful consideration of all the cases cited, including the *Rhodesia Railways case* which I have but briefly mentioned, it seems to me that a vital consideration for the purpose of deciding whether work done constitutes a "replacement" the cost of which should be borne out of capital expenditure, or whether it may fairly be regarded as "repair of premises" the cost of which can be regarded as income expenditure, is the size, extent and importance of that work done in relation to the tax payer's whole income producing undertaking and whether or not it can be said that such work has resulted in the creation of a new asset. In this case, for the reasons I have endeavoured to state, I am, therefore, of the opinion that there was evidence before the Board upon which it could properly come to the conclusion that the construction of this watergate was a repair of premises, such premises being the whole drainage system of the ten watergates, that the construction of the single watergate, taken by itself, was not an independent entity which could be said to create any new asset, and that in consequence the cost of such construction ought to be regarded as income expenditure. I would add that there is, of course, no suggestion, and certainly no evidence, that the company has in mind the construction of an entirely new, and presumably improved, system of watergates by the simple process of building a new gate every year or alternate year. Such a course, if embarked upon, would clearly not be a repair of existing premises but a replacement of those premises by a new drainage system. That would be a capital and not an income expenditure.

Finally, Mr. Hill contended that in any event, even if the construction of the new watergate in place of the existing one could properly be regarded as the "repair of premises" within the meaning of sub-section (c), it is still caught by the proviso to that sub-section which specifically provides that "no deduction shall be made for the cost of ..... reconstruction or rebuilding of any premises, buildings, structures or works of a permanent nature". I must confess I cannot understand precisely what that proviso is intended to mean. But if the construction Mr. Hill asks me to place upon it is correct, then it seems to me that the whole sub-section becomes meaningless in that the benefit which the sub-section seeks to confer is entirely negatived by the proviso itself. It cannot, I think, be disputed that "repair of premises" may necessarily involve some element of rebuilding and even of reconstruction. If Mr. Hill's argument is correct, then whilst the sub-section itself entitles you to a deduction for any expenses incurred in the repair of your premises or any part thereof, if, in the course of such repair, you rebuild or reconstruct any part of such premises, then, by virtue of the proviso, you lose your right to deduct the expenses incurred in the cost of repair. I do not think that can be correct. In order to make sense of the proviso I think that Mr. Eusoffe Abdoolcader is correct in his submission that the words "the cost of reconstruction or rebuilding of any premises, buildings, structures or works of a permanent nature" must be strictly construed to mean the whole of such "premises, buildings, structures, ..." and that the words "or any part thereof" which do not appear in the proviso may not be imported into the proviso. In other words, to put the matter in another way, you may repair your premises or any part thereof and claim a deduction under sub-section (c) but if, under the guise or pretext of repair, you reconstruct or rebuild the whole premises, buildings, structures, etc., then, by virtue of the proviso, it becomes a capital expenditure and you lose your right to make any deduction for the whole cost of such expenses although you may claim a rebate or an allowance towards the cost of such work under sections 16 or 18A of the Ordinance.

In the present case, for the reasons I have given, I am satisfied that there was evidence upon which the Board could properly find that the construction of the watergate was a repair of part of the drainage system. That being so, in my view, the proviso to sub-section 14(1)(c) is inoperative and of no effect.

For these reasons I am of the opinion that the decision of the Board of Review must be confirmed and that this appeal must be dismissed with costs.

In conclusion, I wish to express my indebtedness to both counsel, Mr. Hill for the appellant, and Mr. Eusoffe Abdoolcader for the respondent company, for the clarity of their arguments and for the most able manner in which they have presented them before me.

Appeal dismissed.

Solicitors: *Rodyk & Davidson; Presgrave & Matthews.*

BRITISH LIGHTERAGE CO. v. LORD HIGH ADMIRAL OF THE UNITED KINGDOM

[C.A. (Rose C.J., Tan Ah Tah and Wee Chong Jin JJ.) April 12, 1961]

[Singapore — Civil Appeal No. 6 of 1960]

Carriage of goods by sea — Period of limitation under Carriage of Goods by Sea Ordinance, (Cap. 173), Art. III r.6 — Whether binds Crown — Interpretation and General Clauses Ordinance (Cap. 2), s.57.

The Crown is not bound by the special period of one year's limitation in Art. III r.6 of the Carriage of Goods by Sea Ordinance, (Cap. 173) in the absence of an express provision or necessary implication.

COURT OF APPEAL.

K. A. Seth for the appellants.

J. E. Lloyd for the respondents.

Rose C.J. (with whom **Tan Ah Tah** and **Wee Chong Jin JJ.** agreed): This is an appeal from a ruling of the learned trial Judge disallowing an application by the defendants/appellants to amend their defence, at a late stage of the proceedings, by pleading that the action was barred by the failure of the plaintiffs to bring this suit within one year after delivery of the goods, the subject matter of the action, as provided by Article III rule 6 of the Schedule to the Carriage of Goods by Sea Ordinance (Chapter 173).

Learned counsel for the plaintiffs/respondents contended that the Crown is not bound by this special period of one year's limitation and that therefore the question whether the learned trial Judge was right in disallowing the proposed amendment is academic.

As learned counsel for the appellants submitted, two questions arise for decision :—

(1) Are the plaintiffs/respondents the Crown? and

(2) Is the Crown bound by the special period of one year's limitation?

Learned counsel conceded that the plaintiffs/respondents are the Crown and therefore only the second point remains for consideration.

Section 57 of the Interpretation and General Clauses Ordinance (Cap. 2) reads as follows :—

"57. No Ordinance shall in any manner whatsoever affect the rights of the Crown unless it is therein expressly provided, or unless it appears by necessary implication, that the Crown is bound thereby."

In general there is no ground for holding that it appears by necessary implication that the Carriage of Goods by Sea Ordinance should bind the Crown; nor was it suggested by learned counsel for the appellants that this was so. Indeed, section 3 of the Limitation Ordinance 1959 (Ordinance No. 57 of 1959) clearly indicates that the legislature sees nothing objectionable in principle in relieving the Crown from the handicaps imposed by the limitation of actions.

Learned counsel for the appellants relies on a different argument. He contends that the rules contained in the Schedule to the Carriage of Goods by Sea Ordinance are contractual and that therefore the parties in the present case were bound by the special period of limitation contained in Article III rule 6, notwithstanding the general exemption of the Crown from these matters of limitation.

In the present matter there was a contract in writing between the parties and, assuming neither of the parties to be the Crown, it would no doubt have been the case that any omissions in the written contract might be supplemented by reference to the Rules in the Schedule to the Ordinance. That, however, does not seem to me to avail the appellants as there is nothing in that proposition which, to my mind, is inconsistent with the contention of the Crown that they are not bound by the Ordinance or by the Rules in the Schedule unless expressly provided in the contract itself.

In the present matter the question of limitation is not mentioned at all in the contract and I am therefore of opinion that the special period of one year's limitation specified in rule 6 has no application to the present matter for the reason that the Crown can fairly say that by reason of section 57 of the Interpretation and General Clauses Ordinance they are not bound by the provisions of the Carriage of Goods by Sea Ordinance.

For these reasons the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Sisson & Delay; Drew & Napier.*

Re MAHMOODA BINTE ISMAIL

[O. Bk. J. (Ambrose J.) April 13, 1961]

[Singapore — Bankruptcy No. 344 of 1960]

Bankruptcy — Married woman — No separate property at date of hearing of petition — Bankruptcy Ordinance, (Cap. 11), s.120 — Bankruptcy Notice based on judgment in Scott *v.* Morley *form — No valid act of bankruptcy — Jurisdiction of Court to adjudge married woman bankrupt.*

This was a bankruptcy petition against a debtor who was a married woman at all material times. The act of bankruptcy alleged was non-compliance with a